***United States Court of Appeals***

***for the Second Circuit***

# BRIEF FOR APPELLEE

77-7182

# United States Court of Appeals

FOR THE SECOND CIRCUIT

ERIC E. SMITH,

*Plaintiff-Appellant,*

—v.—

AMERICAN PRESIDENT LINES, LTD., and MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO,

*Defendants-Appellees.*

UNITED STATES COURT OF APPEALS
FILED
JUN 20 1977
M. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR APPELLEE MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO

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## STATEMENT OF THE ISSUES

1. Whether the District Court was correct in dismissing the appellant's Complaint alleging discrimination under the Civil Rights Act of 1964, as amended in 1972, 42 USC § 2000 e et. seq. because the appellant did not file a charge with the Equal Employment Opportunity Commission within 180 days after the last alleged unlawful employment practice committed by MEBA as required by 42 USC § 2000 e -5(e)

2. Whether the statutory period for the filing of a charge of alleged discrimination with the Equal Employment Opportunity Commission, as set forth in 42 USC § 2000 e -5(e), can be tolled.

## STATEMENT OF THE CASE

This action was commenced with the filing of a Complaint in the U. S. District Court for the Southern District of New York on May 28, 1975. (A-1,2,3,4,5,6,7) In the appellant's Complaint it was alleged, inter alia, that the court had jurisdiction by virtue of 42 USC § 2000 e et. seq., 42 USC § 1981 and 29 USC § 151 et. seq. (A-2)

After discovery was undertaken the defendant, American President Lines, Ltd. (hereinafter referred to as "APL"), filed a Motion to Dismiss which the District Court denied in part as to the allegations under 42 USC § 2000 e et. seq. (A-31), and granted in part with respect to the allegations of violation of 42 USC § 1981. (A-32)

Following the denial by the District Court of the portion of defendant, APL's Motion which sought dismissal of the cause of action under 42 USC § 2000 e et. seq., defendant, APL moved for reargument as to that portion of its motion which has been denied.

Upon reargument the District Court recalled its original determination denying the defendant, APL's motion in part and granted the motion with respect to the cause of action pursuant to 42 USC § 2000 e noting that:

> "This court's previous denial of the motion was based on a miscalculation of the time between the alleged discriminatory act and the filing of plaintiff's charge with the Equal Employment Opportunity Commission. Since plaintiff's charge was filed in excess of 300 days after his termination, plaintiff has not satisfied the time limits in 42 USC § 2000 e -5(e)."(A-151)

Following the granting of the motion in question as to defendant, APL, the defendant Marine Engineers Beneficial Association (hereinafter referred to as "MEBA") entered into a stipulation with the co-defendant, APL,and the plaintiff, which was subsequently"so ordered"and provided that the allegations in the complaint against defendant MEBA for an alleged breach of that defendant's duty of fair representation were withdrawn and the claim of the plaintiff for said alleged breach was dismissed. (A-152)

The stipulation further provided that the plaintiff agreed that the District Court's memorandum decision and order granting the motion of APL to dismiss appellant's Title VII claim also applied to the defendant MEBA with the same force and effect as if a determination on a separate motion by that defendant to dismiss had been made. (A-153)

The stipulation as so ordered further provided that a final judgment may be entered dismissing the complaint and the action in its entirety subject to the right of the plaintiff to appeal therefrom. (A-153)

As can be noted from the brief of the appellant at page 2, fn.1, the appellant has appealed only from the District Court's decision with respect to the cause of action under Title VII of the Civil Rights Act of 1964, 42 USC § 2000 e et.seq.

## STATEMENT OF THE FACTS

Plaintiff was employed as a Second Assistant Engineer on defendant APL's vessel, the SS President Pierce, from approximately June 8, 1970 until October 6, 1970 when he was discharged by the defendant, APL, from employment on the vessel.

At the time of his discharge Appellant was an applicant for membership in District No.1-Pacific Coast District, MEBA, which had a collective bargaining agreement covering licensed marine engineers employed on defendant, APL's vessels. (A-92,93)

Following appellant's discharge he made no genuine attempt to utilize the grievance procedure (A-78) under the collective agreement between District No. 1-Pacific Coast District, MEBA and defendant APL with respect to any claim he might have had for discharge without cause. (A-92,93)

Defendant, MEBA, subsequently learned that the appellant had filed a charge of racial discrimination with the New York State Division of Human Rights solely against the defendant APL and several of its vessel employees on the vessel from which the appellant had been discharged. (A-76, 77)

On September 17, 1971, the New York State Division of Human Rights (hereinafter referred to as"NYSDHR") issued its finding, inter alia, that the respondents named in the charge filed by the appellant with the NYSDHR did not commit any unlawful or discriminatory practice by discharging the appellant.

It should be emphasized that the defendant, MEBA, was not named in the charge the appellant had filed with the NYSDHR and was not named in any findings of fact, decision or order of the NYSDHR. (A-80-84)

On December 4, 1972, the NYSDHR informed the appellant that his rights under the Human Rights Law had been exhausted (A-45) after he attempted to reopen his case following the decision of the NYSDHR Appeal Board in Appeal No. 1074. (A-86,96,97,106,107)

Despite the absence of any charge filed with a state or local agency within the meaning of 42 USC § 2000 e -5(e) with respect to defendant, MEBA, the appellant filed his first charge with the Equal Employment Opportunity Commission against MEBA on November 19, 1971, more than one year after the termination of his employment by defendant, APL, and his advice to defendant, MEBA's Vice President, that he was taking steps to protect his interests outside the union. (A-78, 88, 89)

Subsequently, on November 24, 1972 the appellant filed an amended charge with Equal Employment Opportunity Commission wherein any reference to defendant, MEBA, was deleted. (A-44)* This amended charge was given a Case File No. TNY 2-0491.

On April 26, 1975 the appellant filed a further charge against defendant, MEBA, alleging retaliation because of the previous charge filed, No. TNY 2-0491. This case was assigned a file number by the Equal Employment Opportunity Commission TNY 5-0600. (A-116)

On May 6, 1975 the Equal Employment Opportunity Commission issued a notice of right to sue in case TNY 2-0491. (A-121)

Thereafter, on May 28, 1975 the appellant filed the complaint in this action. ** (A-1)

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* The MEBA cannot understand how the EEOC continued to consider it a respondent at the time the EEOC issued its notice of right to sue since MEBA was not named in the last amended charge which resulted in this suit. (A-44)

**The only charge which the appellant filed with the Equal Employment Opportunity Commission which named MEBA and which the District Court could, arguendo, have jurisdiction, was the charge filed on November 19, 1971(A-88,89,121), since this is the only charge in which the MEBA was alleged to have committed discrimination and the only charge concerning MEBA in which the Equal Employment Opportunity Commission had completed its required investigation and issued a notice of right to sue. Troy v. Shell Oil Co., 378 F.Supp.1042 (DC Mich (1974), Appeal Dismissed, 519 F.2d 403 (6th Cir.1975), Weise v. Syracuse University, 522 F.2d 397 (2nd Cir.1975)

In the only charge filed with the Equal Employment Opportunity Commission which names MEBA the appellant states that the most recent date on which the discrimination which is alleged took place was September 18, 1970. (A-88,89)

In response to the questions such as: "What unfair thing was done to him and how are other persons treated differently", the appellant asserted that he took his complaint to the union on October 6, 1970 and was told on that date that the union representative had investigated the matter and advised the appellant that he should forget the whole thing regarding the appellant's discharge by defendant, APL. (A-88,89)

In opposing defendant, APL's motion to dismiss on reargument, the appellant asserted for the first time that the discriminatory act by the defendant union did not cease on or about October 6, 1970, but was part of a discriminatory chain of events which involved the defendant union to the extent that the defendant MEBA had failed to post the Equal Employment Opportunity Commission posters required by Title VII in 1970. (A-139)

Appellant further alleged that he would have proceeded promptly to the Equal Employment Opportunity Commission the day of his discharge if he had known about the Equal Employment Opportunity Commission at that time. Thus, the appellant urged that the District Court should excuse his failure to comply with the time limitations of 42 USC § 2000 e -5(e) since defendant's alleged illegality prevented him from complying with the requirements as to the filing of charges of discrimination with the Equal Employment Opportunity Commission. (A-139)

The court below rejected this contention in granting defendant, APL's motion to dismiss and subsequently so ordered the stipulation entered into between defendants, MEBA, APL and appellant. (A-151,152,153,154)

The complaint filed by the appellant herein in the U. S. District Court for the Southern District of New York alleges five separate acts of discrimination by defendant, MEBA. (A-30)

The first sub-paragraph (a) alleges that MEBA failed to admit the appellant to full and unencumbered union membership on account of his race. This allegation is not included in form or substance in the only charge filed with the Equal Employment Opportunity Commission which names MEBA. (A-88-89)

Thus, in regard to this sub-paragraph the District Court appropriately dismissed this action as to MEBA since the appellant never filed a charge with the Equal Employment Opportunity Commission regarding this form of discrimination as required by 42 USC § 2000 e -5(e).*

The second act of discrimination in sub-paragraph (b) of the complaint alleges that the defendant, MEBA failed to refer the plaintiff for work through its hiring hall according to its Group I preferential list on account of his race. (A-30)

Here again, the District Court appropriately dismissed this action as to MEBA since the appellant never filed a charge with the Equal Employment Opportunity Commission regarding this form of discrimination as required by 42 USC § 2000 e -5(e).

The third act of discrimination alleged in appellant's complaint which is said to have been committed by defendant, MEBA, involves the alleged failure of defendant, MEBA to investigate the appellant's grievance which he allegedly filed subsequent to his discharge from the SS President Pierce on October 5, 1970. The appellant, in the only charge he filed with the Equal Employment Opportunity Commission which names MEBA concedes that the investigation that was conducted was concluded on October 6, 1970. (A-30)

* Weise v. Syracuse University, 522 F.2d 397 (2nd Cir. 1975) DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2nd Cir. 1975)

Also within one month after his discharge, which is the subject of this action, the appellant expressly advised the union that he desired to take further steps to protect his interests outside the union's auspices. (A-78)

Assuming, solely arguendo, the union had an obligation to conduct any further investigation, the appellant elected upon his own volition not to process his grievance with the union no later than November 2, 1970. (A-78) The last act of discrimination in this regard by MEBA could, therefore, not have occurred after that date.

The fourth act of discrimination alleged to have been committed against the appellant by defendant MEBA involves the so-called failure to process his grievance which was filed subsequent to his discharge from the SS President Pierce. (A-30)

Assuming, arguendo, the union had an obligation to process the grievance, the appellant elected upon his own volition not to process his grievance with the union no later than November 2,1970.(A-78) The last act of discrimination in this regard by MEBA could, therefore, not have occurred after that date. (A-30)

The final act of discrimination which is alleged to have been engaged in by defendant, MEBA, against the appellant herein is the so-called charge of retaliation

for appellant having filed charges of racial discrimination pursuant to Title VII of the Civil Rights Act of 1964 by the then allegedly current challenging by MEBA of appellant's application for membership.

The retaliation in question was the subject of a separate charge filed with the Equal Employment Opportunity Commission on April 26, 1975 which was assigned Equal Employment Opportunity Commission Case No. TNY 5-0600.(A-116) As noted in the footnote on page 6, supra, the Equal Employment Opportunity Commission had not been granted 180 days to investigate this charge and had not issued a notice of right to sue. (A-121)

With respect to this most recent charge the District Court was again without jurisdiction with respect to the appellant's charge of retaliation, perhaps for a different reason than that stated by the District Court in its orders dismissing this action, (A-151,152, 153, 154) since no notice of right to sue had been issued. Weise, supra, and DeMatteis, supra.

## ARGUMENT

### POINT I

**APPELLANT DID NOT FILE HIS CHARGE WITHIN THE TIME PRESCRIBED BY 42 USC § 2000 e -5(e) AND THE DISTRICT COURT WAS THUS CORRECT IN DISMISSING THE COMPLAINT.**

Congress provided in 42 USC § 2000 e -5(e) that a charge under the Civil Rights Act of 1964

> "...shall be filed within 180 days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within 10 days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within 300 days after the alleged unlawful employment practice occurred, or within 30 days after receiving notice that the State or local agency has terminated the proceedings under this State or local law, whichever is earlier... "

Applying the above quoted section to the facts involving the unlawful employment practices alleged to have been committed by defendant, MEBA, it is clear that the appellant did not comply with the requirements of 42 USC § 2000 e -5(e) since it is clear that the appellant did not file the charge of

discrimination with the Equal Employment Opportunity Commission which named MEBA within 180 days of the acts of discrimination complained of by appellant.*

The last act of discrimination based on the charge and complaint naming MEBA occurred no later than October 6, 1970 when the appellant alleges the MEBA declined to process his grievance claiming discharge without cause from APL (A-42); Davidson v. Topley, 11 FEP 573 (S.D.N.Y. 1975) and cases cited therein.

Since the appellant did not institute any proceedings with a State or local agency against MEBA, it is apparent that the 180 day time period prescribed in 42 USC § 2000 e -5(e) applies to the charge of unlawful employment practices, if any, which the appellant may have filed with the Equal Employment Opportunity Commission with respect to MEBA. Weise v. Syracuse University, 522 F.2d 397 (2nd Cir.1975)

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*The only charge which the appellant filed with the Equal Employment Opportunity Commission which named MEBA and which the District Court could, arguendo, have jurisdiction, was the charge filed on November 19, 1971(A-88,89, 121), since this is the only charge in which the MEBA was alleged to have committed discrimination and the only charge concerning MEBA for which the Equal Employment Opportunity Commission had completed its required investigation. Troy v. Shell Oil Co. 378 F.Supp.1042 (DC Mich (1974), Appeal Dismissed, 519 F.2d 403 (6th Cir. 1975), Weise v. Syracuse University, 522 F.2d 397 (2nd Cir.1975)

In this case the only charge against MEBA filed with the Equal Employment Opportunity Commission, which is the subject of the complaint in this case, was filed on November 19, 1971 more than six months after the statutory time had expired.

Thus, the District Court was correct in not only granting defendant APL's motion to dismiss for failure of the appellant to comply with the limitations of time required in 42 USC § 200 e -5(e), but in "so ordering" the stipulation and dismissing the complaint in its entirety. White v. Texaco, Inc., 7 FEP 367 (S.D.N.Y. 1973)

The appellant apparently does not dispute the contention that if the discriminatory acts alleged in the complaint occurred on or before October 6, 1970 his charge was untimely filed. (Appellants Brief, 14,15)

Appellant attempts to surmount the time bar hurdle he is confronted with by suggesting that this case falls within the rationale espoused by this court in Weise v. Syracuse University, 522 F.2d 397 (2nd Cir. 1975) and Egelston v. State University College at Genesco, 535 F.2d 752 (2nd Cir. 1976) as a case involving a continuing course of discriminatory conduct. See also, Noble v. University of Rochester, 535 F.2d 756 (2nd Cir. 1976).

There is simply no evidence in this record which would suggest to this court that the discrimination allegedly complained of by appellant insofar as MEBA is concerned was of a nature which could be characterized as a continuing course of discriminatory conduct.

As noted, supra, the only charge against MEBA on which the Equal Employment Opportunity Commission issued a right to sue letter alleged that the act of discrimination occurred in September, 1970 and MEBA will concede for the purpose of argument that October 6, 1970 would be a proper date upon which to state that a discriminatory act, if any, arguendo, occurred, since this was the date when the appellant was told by MEBA's representative that the grievance he had concerning discharge without cause would not be processed further.

In Noble, Egelston and Weise, supra, this court found a continuing course of discrimination involving refusals to hire and rehire which is simply not demonstrated in this record. On the contrary, the appellant has obtained other employment through the MEBA's hiring hall on a number of occasions since his discharge in October, 1970 by defendant, APL, (Dep. of Appellant - 119, 120) and the appellant's grievances have been processed by defendant, MEBA. (Dep. of Appellant - 79)

Moreover, the absence of any allegation in the complaint that demonstrates that this case involves a cause of action with continuing courses of discriminatory conduct suggests that the effort of the appellant to belatedly amend his complaint on appeal to this court or even in reply to defendant, APL's motion to dismiss in the District Court, is improper since it is inconsistent with the normal rules of pleading and should not be countenanced by this court. (Federal Rules of Civil Procedure 15 (a))

For these reasons the court should reject the appellant's claim of a continuing course of discrimination and affirm the dismissal of the District Court.

## POINT II

## 42 USC § 2000 e -5(e) OF THE CIVIL RIGHTS ACT IS JURISDICTIONAL AND CANNOT BE TOLLED.

The appellant asserts that the statutory time period found in 42 USC § 2000 e -5(e) is not jurisdictional and that it can be tolled by equitable considerations. Applying this supposed principle, appellant argues that the period was tolled because

> "...at no time during his presence on the company's ship in 1970 and at no time during his periodic and frequent visits to his union offices - continuing to August 20, 1976 - has he seen a notice posted advising employees and union members that if they feel they have been discriminated against on account of their race or other prohibited bases, they should file charges with the EEOC." (A-53,54)

It is MEBA's position that the statutory period is jurisdictional and that even if it were not the alleged failure to post would not constitute an equitable ground in which to toll the running of the statute.

There exists a long line of cases holding that the limitation periods in the Civil Rights Acts are jurisdictional, e.g., Wong v. The Bon Marche, 508 F.2d 1249 (9th Cir. 1975); Genovese v. Shell Oil Co., 488 F.2d 84 (5th Cir. 1973); Archuleta v. Duffy's, Inc., 471 F.2d 33 (10th Cir. 1973); Goodman v. City Products, 425 F.2d 702 (6th Cir. 1970); Huston v. General Motors, 477 F.2d 1003 (8th Cir. 1973); Stebbins v. Nationwide Insurance Co., 469 F.2d 268 (4th Cir.1972; Cleveland v. Douglas Aircraft, 509 F.2d 1027 (9th Cir. 1975); Harris v. National Tea, 454 F.2d 307 (7th Cir. 1971); Hinton v. CPC International, 520 F.2d 1312, 10 FEP 1423 (8th Cir.1975); Smith v. OEO For Arkansas, 13 FEP 132 (8th Cir.1976). This is also the thrust of the Supreme Court decisions in McDonnell Douglas v. Green, 411 U.S. 792, 798 (1973); Johnson v. Railway Express, 421 U.S. 454 (1975); Electrical Workers v. Robbins and Myers, 429 U.S. 229, 239-240, 97 Sup. Ct. 441,447-449 (1976); and United Air Lines v. Evans, _____ U.S. _____, 14 FEP 1510, 1511-1512 (1977). Plaintiff cites only one Court of Appeals decision under Title VII of the Civil Rights Act to the contrary, Reeb v. Economic Opportunity Atlanta, 516 F.2d 924 (5th Cir. 1975). The Court of Appeals

for the Sixth Circuit in Guy V. Robbins and Myers, 525 F.2d 124 (6th Cir. 1975) stated:

> "In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Supreme Court rules that the adverse decision of an arbitrator did not foreclose resort by the grievant to her federal remedy. The reasoning of the Court in that opinion supports the proposition that the filing of a grievance under a collective bargaining agreement does not toll the limitation period of an applicable federal or state statute. The Court pointed out that in seeking relief under Title VII, the employee was not seeking to review an arbitrator's decision, but was asserting an independent right. In Johnson v. Railway Express Agency, Inc., 43 LW 4623 (1975), the Court held that the various remedies available to aggrieved employees are 'separate,distinct and independent.' It would be utterly inconsistent with the thesis of these two opinions to hold that the pursuit of any of these remedies operates to toll other remedies that the employee has the right to resort to concurrently."

This decision in this regard was affirmed by the Supreme Court in Electrical Workers v. Robbins and Myers, supra. In so doing, the Supreme Court specifically rejected the argument that "equitable tolling principles should be applied" by stating:

> "But the principle answer to this contention is that Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitation and gave no indication that it considered a slight delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision', Congress did not leave to court the decision as to which delays might or might not be slight."(97 Sup. Ct. at 448-449)

In United Air Lines v. Evans, ____U.S.____, 14 FEP 1510, 1511 (1977), the Supreme Court once again asserted that the "timely filing is a prerequisite to the maintenance of a Title VII action." It further declared:

> "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences."

The Supreme Court decisions, supra, are dispositive that the statutory time periods in 42 USC § 2000 e -5(e) are jurisdictional in nature and cannot be tolled.

Even assuming the statutory time periods are not jurisdictional in nature, appellant has set forth no equitable ground for extending the time period beyond the 180 days. Appellant contends on page 15 of his brief that because he did not "see" the Equal Employment Opportunity Commission notice and because appellees did not make appellant "aware" of his rights through the required posting of notices, he would be entitled to an extension of time. It must be noted that appellant did not file a charge claiming that appellee did not post the required notice. Under the Evans case, supra, this alone should be sufficient grounds for dismissing this argument.

Moreover, there is no case holding that the posting or non-posting of various government notices acts as a waiver of any statutory time period and appellant has cited none. In fact, the opposite could be said to be true, see Aarid Van Lines, Inc., 22 WH 1189, 1190, Fn. 1 (U.S. Dept. of Labor 1976). Ignorance of the law has long been held not to excuse compliance with statutory time periods, c.f., Wong v. Bon Marche, 508 F.2d 1249 (9th Cir. 1975). In Skoalund v. Singer Co., 13 FEP 253 (D.N.H. 1975), the Court stated that plaintiff should have known his rights under the age discrimination law and that "he cannot now claim that his ignorance is due solely to defendant's alleged failure to post notice of ADEA as required by 29 USC § 627."

In this case, appellant does not explain why he was unaware of the Civil Rights Act. It is highly unlikely that appellant, who has been engaged in numerous ligigations and who was aware of his rights under the New York Human Rights Law, would be unaware of the federal civil rights law. This lack of knowledge is particularly astounding when appellant admitted in Deposition that he was in the United States when the Civil Rights Act was passed, that he regularly reads New York newspapers and national magazines and watches television, including newscasts. (A-149) Furthermore, appellant claims he has never

seen an Equal Employment Opportunity Commission notice on any ship he has been on, not just that of appellees. (A-149) There is nothing in the complaint indicating that in any way appellees' "prevented" appellant from filing the charge. At most, even if appellant's highly preposterous facts are accepted as true (and they are denied by appellee), there merely exists an omission on this appellee's behalf and not any deliberate act preventing appellant from taking any action which would require the tolling of the statute.

## CONCLUSION

For all the aforegoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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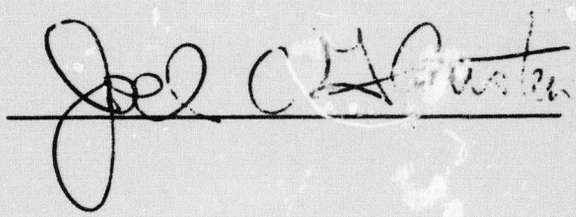
## CERTIFICATE OF SERVICE

I, JOEL C. GLANSTEIN, attorney for Appellee, Marine Engineers Beneficial Association, AFL-CIO, hereby certify that I have served copies of the foregoing Brief of Appellee upon counsel for the Appellant and Appellee, American President Lines, Ltd., by causing two copies each of same to be placed in the U. S. Mail, postage prepaid, addressed to them, this 20th day of June, 1977.



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